

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, DC 20436

In the Matter of

**CERTAIN GEL-FILLED WRIST RESTS AND
PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-456

**NOTICE OF COMMISSION DECISION TO REVIEW PORTIONS OF AN INITIAL
DETERMINATION FINDING NO VIOLATION OF SECTION 337 OF
THE TARIFF ACT OF 1930**

AGENCY: U.S. International Trade Commission

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review certain portions of a final initial determination (ID) of the presiding administrative law judge (ALJ) finding no violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Mary Elizabeth Jones, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E St. S.W., Washington, DC 20436, telephone (202) 205-3106. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at (202) 205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). Copies of the public version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) In the Office of the Secretary, U.S. International Trade Commission, 500 E St. S.W., Washington, DC 20436, telephone (202) 205-2000.

SUPPLEMENTARY INFORMATION: The Commission ordered the institution of this investigation on May 17, 2001, based on a complaint filed on behalf of 3M Innovative Properties Company and Minnesota Mining & Manufacturing Company (now called 3M Company), both of St. Paul, Minnesota (collectively "complainants"). 66 *Fed. Reg.* 27535 (May 17, 2001). The complaint alleged violations of section 337 in the importation, sale for importation, and sale within the United States after importation of certain gel-filled wrist rests by reason of infringement of claims 1, 3, 6, 7, or 8 of U.S. Letters Patent 5,713,544 ("the '544 patent"). The complaint named eight respondents: Velo Enterprise Co., Taiwan;

Aidma Enterprise Co. Ltd., Taiwan; Good Raise Chemical Industry Co., Ltd., Taiwan; ACCO Brands, Inc., Lincolnshire, Illinois; Curtis Computer Products Inc., Provo, Utah; Alsop, Inc., Bellingham, Washington; American Covers Inc., Draper, Utah; and Gemini Industries, Inc., Clifton, New Jersey. *Id.* The complaint and notice of investigation were later amended to add Crown Vast Development Ltd., Taiwan, and Hornleon Company, Ltd., Taiwan, as respondents.

On January 7, 2002, complainants and respondents filed their “Stipulation Concerning Domestic Industry,” stipulating and agreeing to certain facts relating to the establishment of the economic prong of the domestic industry. An evidentiary hearing was held from January 14, 2002, through January 18, 2002. On October 22, 2001, the ALJ issued an ID (ALJ Order No. 6) granting complainants’ unopposed motion to terminate the investigation with respect to Gemini Industries, Inc., on the basis of a consent order. On January 9, 2002, the ALJ issued an ID (ALJ Order No. 12) finding respondents Good Raise and Aidma in default. On May 15, 2002, the ALJ issued an ID (ALJ Order No. 15) granting complainants’ unopposed motion to terminate the investigation with respect to Curtis Computer Products Inc., on the basis of a consent order. On May 21, 2002, the ALJ issued an ID (ALJ Order No. 16) granting complainants’ unopposed motion to terminate the investigation with respect to Alsop, Inc., on the basis of a consent order. None of these IDs were reviewed by the Commission.

On July 24, 2002, the ALJ issued his final ID, concluding that there was no violation of section 337, based on the following findings: (a) complainants have not established that any accused product infringes any asserted claim of the ’544 patent; (b) invalidity of the ’544 patent due to obviousness has been established by clear and convincing evidence; (c) invalidity of the ’544 patent due to a failure to disclose the best mode has been established by clear and convincing evidence; and (d) it has been established that complainants do not practice the ’544 patent and that therefore the domestic industry requirement of section 337 is not met. The ALJ also found that: (a) respondents have failed to establish by clear and convincing evidence that the ’544 patent is invalid due to anticipation; (b) invalidity of the ’544 patent due to the lack of a written description or the lack of enablement has not been established by clear and convincing evidence; (c) invalidity of the ’544 patent due to indefiniteness has not been established by clear and convincing evidence; (d) invalidity of the ’544 patent due to improper joinder or non-joinder of inventors has not been established by clear and convincing evidence; (e) unenforceability of the ’544 patent due to inequitable conduct before the U.S. Patent and Trademark Office has not been established by clear and convincing evidence; and (f) it has not been established by clear and convincing evidence that complainants are barred from asserting the ’544 patent due to equitable estoppel. ID at 217-18.

On August 5, 2002, respondents ACCO, American Covers, Inc., Crown Vast Development, Ltd., and Velo Enterprise Co., Ltd. (hereinafter “respondents”) filed a petition for review. On August 7, 2002, the Commission investigative attorney (“IA”) filed a petition for review. On August 8, 2002, complainants filed a petition for review. On August 12, 2002, complainants filed a response to petitions for review. On August 15, 2002, respondents and the IA filed responses to petitions for review.

Having examined the record in this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review:

- (1) the ID's construction of the asserted claims of the '544 patent;
- (2) the ID's infringement conclusions;
- (3) the ID's validity conclusions with regard to obviousness and failure to disclose best mode of practice; and
- (4) the ID's conclusion with respect to the technical prong of the domestic industry requirement.

The Commission has determined not to review the remainder of the ID.

The Commission determined to deny complainants' request for oral argument.

On review, the Commission requests briefing based on the evidentiary record on all issues under review and is particularly interested in receiving answers to the following questions, with all answers cited to the evidentiary record:

1. Assuming that the ALJ correctly construed the claim 1 term "pad," is it an error to conclude that infringement of the '544 patent can only be proven by testing the pads as they are intended to be used, *i.e.*, with any outer coverings still on the gel? If infringement can be proven by testing the pads without any coverings, please identify the relevant record evidence supporting a finding of infringement or non-infringement.
2. Assuming that the ALJ correctly construed the claim 1 term "stable elastomeric block polymer gel," is it an error to find that col. 1:55-col. 2:9 are not limitations on claim 1, but col. 2:10-65 do represent limitations on claim 1?
3. Assuming that the ALJ correctly construed the claim 1 term "stable elastomeric block polymer gel" is it an error to require that, in order to satisfy the technical prong of the domestic industry requirement, domestically-made products be made without naphthenic oils?

In connection with the final disposition of this investigation, the Commission may issue (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry that either are adversely affecting it or are likely to do so. For background information, see the Commission Opinion, *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount to be determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. Additionally, the parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the ALJ's July 31, 2002, recommended determination on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than the close of business on September 23, 2002, Reply submissions must be filed no later than the close of business on September 30, 2002. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-45 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-.45)

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: September 9, 2002